

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GEORGE MURRAY LIVINGSTON III
Claimant

VS.

BUTLER TRANSPORT INC.
Respondent

AND

KS. TRUCKERS RISK MGMT. GROUP
Insurance Carrier

Docket No. 1,012,609

ORDER

Respondent and its insurance carrier request review of the January 20, 2005 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

The sole issue litigated at the preliminary hearing was whether claimant's bilateral carpal tunnel syndrome was caused by the admitted traumatic work-related accident that occurred on August 14, 2003 when a brick was thrown through the windshield of the truck claimant was driving.¹ The Administrative Law Judge ordered the "[p]arties to agree upon specialist to treat claimant's bilateral carpal tunnel syndrome." Implicit in that decision is a finding that the August 14, 2003 accident caused the bilateral carpal tunnel syndrome.

The respondent requests review of whether the ALJ erred in ordering medical treatment for claimant's carpal tunnel syndrome. Respondent argues claimant initially complained that he had injured his shoulder and neck and his treating physicians'

¹ A separate claim for repetitive upper extremity injuries, Docket No. 1,020,134, was not consolidated for hearing with this claim.

concluded that his subsequent complaints and diagnosis of carpal tunnel syndrome was not related to the single traumatic August 14, 2003 incident.

Claimant argues the issue raised by respondent is simply the extent of claimant's medical treatment for an admitted work-related injury and, as such, it is a medical issue that is not subject to review from a preliminary hearing. In the alternative, claimant argues the carpal tunnel syndrome was caused by and is a natural and probable consequence of the traumatic accident on August 14, 2003.

The issues before the Board on review are:

1. Does the Board have jurisdiction to review the January 20, 2005 preliminary hearing Order?
2. If so, was claimant's bilateral carpal tunnel syndrome caused by or aggravated, accelerated or intensified as a result of the August 14, 2003 accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant argues the respondent's appeal does not raise a jurisdictional issue for an appeal from a preliminary hearing.

"A finding with regard to a disputed issue of whether the employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employee's employment . . . shall be considered jurisdictional, and subject to review by the board."² Whether claimant's condition and present need for medical treatment for his bilateral carpal tunnel syndrome is due to the admitted work-related accident gives rise to an issue of whether claimant's current condition arose out of and in the course of employment with respondent. This issue is jurisdictional and may be reviewed by the Board on an appeal from a preliminary hearing order.

The claimant was employed as an over-the-road truck driver for respondent. On August 14, 2003, the claimant was driving his truck at 50 miles per hour through Memphis, Tennessee, when he went under a bridge and a brick came through the windshield striking the claimant's right shoulder. The claimant reacted by grabbing and tightly gripping the steering wheel with both hands so that he didn't lose control of the truck. Claimant was able to pull over to the side of the road and stop the truck. At that point, the claimant's right shoulder was hurting.

² K.S.A. 44-534a(a)(2).

Claimant contacted his employer and was instructed to notify the police. When claimant notified his employer of the incident he never made any complaints of bilateral hand pain. After the police report was completed, the claimant then drove the truck approximately 25 miles to Tunica, Mississippi, where he parked for the night. Claimant testified his shoulder was feeling worse the following morning but that he did not have any other symptoms. That day the claimant took the truck to have the windshield repaired which took all day.

As claimant proceeded on his route the next day he stopped in Sallisaw, Oklahoma, and sought treatment at the emergency room. X-rays were taken of his right shoulder which were negative. He continued to drive to Montrose, Colorado, and then back to Kansas City. Claimant testified the pain in his shoulder and neck continued to progress during his road trip. He could barely move his right arm so he drove from Colorado to Kansas City with his left hand.

Claimant testified he did not notice hand symptoms until a week after the accident. Claimant also testified he began to notice numbness and tingling in his right hand while still driving after the accident. As previously noted, claimant allegedly drove with his left hand from Colorado to Kansas.

Although claimant testified he had never received medical treatment for his hands before August 14, 2003, he further testified he had been diagnosed as having carpal tunnel before August 14, 2003. The claimant testified:

Q. Had you ever received medical treatment to your hands before August 14 of 2003?

A. No.

Q. Had you ever been diagnosed by a doctor as having carpal tunnel before August 14 of 2003?

A. Yes.³

When claimant returned to respondent's business location in Kansas City he sought treatment at the Wyandotte Occupational Health Services. A medical report from that facility dated August 26, 2003, indicated claimant's complaints were limited to his right shoulder. Claimant agreed that is what he told the doctor. Although the first mention of complaints of numbness and tingling in the upper extremities did not appear until a medical appointment with Dr. E. Brooke Roberts on September 11, 2003, the claimant testified he had made such complaints before that time.

³ P.H. Trans. at 6.

EMGs were performed to rule out cervical radiculopathy and as a result it was determined claimant had carpal tunnel syndrome. In a report dated February 5, 2004, Dr. Roberts concluded the carpal tunnel syndrome “falls outside of the covered injury by his work related accident. I have asked him to speak with his adjustor concerning getting approval for treatment for carpal tunnel syndrome.” That request was obviously denied.

At his attorney’s request, the claimant was examined by Dr. Fernando M. Egea on October 4, 2004. In his report the doctor opined:

It is my opinion, within a reasonable degree of medical certainty, that as result of the accident he sustained while at work for Butler Transport, August 14, 2003; Mr. Livingston suffers from right rotator cuff tendinosis with subachromial bursitis, right cervical radiculopathy, and aggravation of the carpal tunnel syndrome.⁴

At respondent’s request, the claimant was examined by Dr. Gary C. Freeman on October 27, 2004. In his report the doctor opined:

Electrodiagnostic studies by Dr. Huynh of 09-22-03 showed some radiculitis at C4-5 versus an upper trunk of brachial plexus irritation, but a severe right median neuropathy injury at the wrist. The mechanics of injury herein would in no way have been causative of carpal tunnel syndrome based on reasonable medical probability and the Daubert accepted peer reviewed evidence-based literature, which is certainly available upon request.

Carpal tunnel syndrome is due to age, body mass index, obesity, configuration, metabolic changes, etc. This type of injury in no way has been recognized in the literature as causative of carpal tunnel syndrome. I do not doubt that the claimant has bilateral carpal tunnel syndrome, worse on the right than on the left. His carpal tunnel syndrome would be as it is whether he had the MVA event at issue or not.

Electrodiagnostic studies of 10-16-03 by Dr. Blum again show the severe right median nerve lesion which certainly pre-existed and was probably progressive as opposed to being caused by the MVA event at issue as explained.⁵

In a letter dated November 19, 2004, Dr. Egea responded to an inquiry from claimant’s attorney whether claimant’s carpal tunnel condition was related to his job. The doctor responded in part:

Mr. Livingston is a truck driver, and his job require[s] the use of his hands and wrists in holding the steering wheel for hours as well as shifting in a repetitive manner. By the nature of this job the constant pressure in the carpal tunnel because maintaining

⁴ *Id.*, Cl. Ex. 1.

⁵ *Id.*, Resp. Ex. A.

continuously the wrist in flexion caused the carpal tunnel condition that he suffers. Truck drivers have a great incidence of carpal tunnel syndrome comparing to the rest of the population.⁶

The doctor did find claimant's condition could be related to his truck driving occupation, mentioning, in particular, the continuous tight grip of the steering wheel while driving and shifting as the probable causative factors for his carpal tunnel syndrome. In this way, the doctor related claimant's condition to his employment, but did not relate it to the traumatic August 14, 2003 accident.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁷ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁸

A brick was thrown through the windshield of the truck claimant was driving and hit him in the shoulder. The claimant alleges that traumatic incident caused the carpal tunnel syndrome that he suffers. Claimant further argues the combination of grabbing and tightly gripping the steering wheel immediately after the incident coupled with only driving with his left hand on the return trip combined to cause the carpal tunnel syndrome.

Claimant did not report hand symptoms when he reported the incident. Nor did claimant report hand symptoms when he sought emergency room treatment. Although claimant testified that the onset of right hand symptoms occurred as he drove from Colorado to Kansas City, the medical record of Dr. Gary Legler from the Occupational Health Services in Kansas City on August 26, 2003, indicated claimant only complained of shoulder and upper back pain.

Claimant provided equivocal testimony regarding the onset of his hand complaints. He testified his hand complaints did not begin until a week after the incident; or that his right hand symptoms began as he was driving back to Kansas City; or that he suffered constant pain in both hands since the accident as he told Dr. Freeman.

Dr. Freeman concluded the carpal tunnel syndrome was not caused by the accident. Initially, Dr. Egea indicated the accident aggravated the carpal tunnel syndrome but his later response to a question from claimant's counsel indicated the carpal tunnel syndrome was caused by repetitive injury instead of a specific traumatic incident.

⁶ *Id.*, Resp. Ex. A.

⁷ K.S.A. 44-501(a).

⁸ K.S.A. 2003 Supp. 44-508(g).

Based upon the record compiled to date, the Board concludes claimant has failed to meet his burden of proof that the carpal tunnel syndrome he suffers was caused by the August 14, 2003 incident at work. The Board finds Dr. Freeman's opinion persuasive that claimant's carpal tunnel syndrome was more probably progressive as opposed to being caused by the traumatic incident on August 14, 2003. Moreover, Dr. Egea's second letter dated November 19, 2004, also indicated the carpal tunnel syndrome claimant suffers was caused by repetitive injury as opposed to a single traumatic incident.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.⁹

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Steven J. Howard dated January 20, 2005, is reversed and claimant's request for medical treatment for bilateral carpal tunnel syndrome is denied.

IT IS SO ORDERED.

Dated this _____ day of March 2005.

BOARD MEMBER

c: Michael J. Haight, Attorney for Claimant
Kevin J. Kruse, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁹ K.S.A. 44-534a(a)(2).